- 92 - 1442

No. _____

SUPREME COURT, U.S.
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THE CLERK

In The

Supreme Court of the United States

October Term, 1992

ADALINE B. GARCIA and DARNELL GARCIA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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119 pp

QUESTION PRESENTED

1. Whether the order of the court of appeals dismissing petitioners' appeal for lack of jurisdiction on account of the government's removal of the civil forfeiture *res* by transferring money held by the district court to the United States Treasury, and the subsequent refusal of the court of appeals to rehear the matter must be vacated and remanded for reconsideration in light of this Court's recent decision in *Republic National Bank of Miami v. United States*, ___ U.S. ___, 113 S. Ct. 554, 121 L. Ed. 2d 474 (1992) and the approval of the President on October 22, 1992 of Section 1521 of the Housing and Community Development Act of 1992, 106 Stat. ___.

LIST OF PARTIES

Petitioners:	Adaline B. Garcia and Darnell Garcia
Respondent:	United States of America
Other parties below:	As this is a civil forfeiture action, the property, 22 Santa Barbara Drive, was the "defendant" in the courts below.

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No. _____

In The

Supreme Court of the United States

October Term, 1992

ADALINE B. GARCIA and DARNELL GARCIA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Adaline B. Garcia and Darnell Garcia hereby petition for a writ of certiorari and request that this Court grant the petition, vacate the orders of the court of appeals dismissing their appeal in this civil forfeiture action for lack of jurisdiction, and remand the case to the Ninth Circuit Court of Appeals for reconsideration in light of *Republic National Bank of Miami v. United States*, 506 U.S. ___, 113 S. Ct. 554, 121 L. Ed. 2d 474 (1992), and enactment of Section 1521 of the Housing and Community Development Act of 1992, 106 Stat. ___.

OPINION BELOW

The order of the court of appeals for the Ninth Circuit in *Adaline B. Garcia and Darnell Garcia v. United States of America*, No. 91-561-84, issued May 8, 1992, dismissing Petitioners' appeal for lack of jurisdiction and denying Petitioners' request to stay appellate proceedings pending this Court's disposition of *Republic National Bank of Miami v. United States*, No. 91-767, *cert. granted*, ___ U.S. ___, 112 S. Ct. 1159, 117 L. Ed. 2d 406 (Feb. 24, 1992), is reproduced in the Appendix to this Petition at page A-1 and is not reported. Petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc, filed in the Ninth Circuit on May 22, 1992 and the unreported order of the court of appeals for the Ninth Circuit denying Petitioners' Petition, issued October 27, 1992 are reproduced at A-18 and A-2 of the Appendix, respectively. The district court decision, *United States v. Real Property Located at 22 Santa Barbara Drive*, No. CV 89-3560-R, rendered July 29, 1991, is reproduced in the Appendix to Petition at A-3, and is not reported. Petitioners' request for a stay of appellate proceedings pending this Court's decision in *Republic National Bank*, is reproduced at A-6 in the Appendix.

JURISDICTION

This Court's jurisdiction to review the orders of the court of appeals for the Ninth Circuit by writ of certiorari is invoked under 28 U.S.C. § 1254(1). The Ninth Circuit court of appeals granted the government's motion to dismiss for lack of jurisdiction on May 8, 1992. A-1. A

timely petition for rehearing and suggestion for rehearing en banc was denied by order dated October 27, 1992. A-2, A-18.

RULES AND STATUTES INVOLVED

This Petition involves Rule 3(a) of the Federal Rules of Appellate Procedure, which provides:

> RULE 3. *Appeal as of right – How Taken*
>
> (a) Filing the Notice of Appeal. An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 U.S.C. § 1292(b) and appeals in bankruptcy shall be taken in the manner prescribed by Rule 5 and Rule 6 respectively.

This Petition also involves Section 1521 of the Housing and Community Development Act of 1992, 106 Stat. ___, which amended 28 U.S.C. § 1355 to provide, in relevant part, as follows:

> In any case in which a final order disposing of property in a civil forfeiture action or proceeding is appealed, removal of the property by the prevailing party shall not deprive the court of jurisdiction.

STATEMENT OF THE CASE

Respondent filed this action under 21 U.S.C. § 881(a)(6), seeking civil forfeiture of Petitioners' home in Palos Verdes, Los Angeles County, California. The house was sold pursuant to the parties' stipulation for interlocutory sale for $1,070,000.00. After deductions for lien interests, expenses and commissions, the remaining $556,594.38 was deposited with the clerk of the district court, as a substitute *res* for the real property.

In the civil forfeiture proceeding, the district court granted summary judgment in favor of the government (even though the government had moved solely for partial summary judgment), and ordered that Respondent recover the full amount of money retained by the court clerk. A-3. Petitioners moved for a stay pending appeal in order to prevent the government from executing on the judgment and, under then controlling Ninth Circuit authority, *see United States v. $29,959 U.S. Currency*, 931 F.2d 549 (9th Cir. 1991); *United States v. $84,740 U.S. Currency*, 900 F.2d 1402 (9th Cir. 1990), arguably divesting both the district court and the court of appeals of jurisdiction. Petitioners requested the trial court to waive the requirement of the posting of a supersedeas bond, since Petitioners lacked the financial means to post one, and since the money, secure in the office of the district court clerk, was not at risk of disappearing. Only minutes before the hearing on Petitioners' application for a stay, the government announced that the United States Marshal had executed on the money and transferred the proceeds to the United States Treasury. The district court rejected Petitioners' stay application on the ground that it lacked jurisdiction.

Petitioners timely filed a notice of appeal. The government raised the matter of *in rem* jurisdiction in its answering brief, challenging the Ninth Circuit's jurisdiction to hear the appeal based on the admiralty rule that once judgment has been executed in a civil forfeiture action, the *res* has been removed from the court's jurisdiction, and thus appellate jurisdiction ceases. *United States v. $84,740.00 U.S. Currency,* 900 F.2d at 1404. The government also moved to dismiss the appeal. Petitioners filed their reply brief and concurrent Motion to Stay Further Proceedings pending this Court's decision in *United States v. One Single Family Residence Located At 6960 Miraflores Ave.*, 932 F.2d 1433 (11th Cir. 1991), *cert. granted sub nom., Republic National Bank of Miami v. U.S.*, ___ U.S. ___, 112 S. Ct. 1159, 117 L. Ed. 2d 406 (Feb. 24, 1992). A-6. The issue presented in *Republic National Bank* was identical to the jurisdictional issue presented in Petitioners' case.

The Ninth Circuit denied Petitioners' Motion To Stay and issued an order dismissing their appeal for lack of jurisdiction based on the "rule" depriving the court of appeals of jurisdiction once the *res* has been removed from the judicial district. A-1. Petitioners filed a petition for rehearing and suggestion for rehearing en banc. A-18. The petition was denied and the suggestion rejected on October 27, 1992. A-2.

On December 14, 1992, this Court issued its opinion in *Republic National Bank,* holding that, in an *in rem* forfeiture action, the court of appeals is not divested of jurisdiction by the government's transfer of the *res* to the United States Treasury. The Court further held that the admiralty "rule" on which the Ninth Circuit relied in Petitioners' case does not even exist. Petitioners therefore

respectfully request this Court to (1) grant the petition for writ of certiorari, (2) vacate the Ninth Circuit's Orders which dismissed the appeal for lack of jurisdiction and denied reconsideration and rehearing, and (3) remand the case for reconsideration in light of the Court's opinion in *Republic National Bank of Miami v. United States*, 506 U.S. ___, 113 S. Ct. 554, 121 L. Ed. 2d 474 (1992).

REASONS FOR GRANTING THE WRIT

This Court granted certiorari in *Republic National Bank* during the pendency of Petitioners' appeal. The Ninth Circuits' dismissal of Petitioners' appeal resulted from its refusal to stay the proceedings and await this Court's decision on the identical jurisdictional issue. A summary reconsideration order, pursuant to Supreme Court Rule 23 and precedent of this Court, is therefore appropriate.

In *Republic National Bank*, the government instituted a civil forfeiture action against a home under 21 U.S.C. § 881. As in Petitioners' case, the residence was sold and the proceeds were retained by the Marshal. The district court entered judgment for the government. The petitioner filed a timely notice of appeal but did not post a bond. Thereafter, at the government's request, the United States Marshal transferred the proceeds of the sale to the United States Treasury. The court of appeals granted the government's motion to dismiss the appeal for want of jurisdiction.

Supreme Court Rule 23 provides for summary dispositions. Where this Court finds that an intervening precedent is sufficiently analogous and perhaps decisive of a case decided while the intervening case was pending, an order vacating the lower court's order and directing reconsideration is appropriate. *Henry v. City of Rock Hill*, 376 U.S. 776, 84 S. Ct. 1042, 12 L. Ed. 2d 7[illegible] (1964); *See also Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 99 S. Ct. 259, 58 L. Ed. 2d 216 (1978) (per curiam) (where court of appeals imposed standard inconsistent with one adopted by the United States Supreme Court in intervening case, Supreme Court vacated the appeals' court decision and remanded for reconsideration).

In this case, an order vacating the Ninth Circuit's orders dismissing Petitioners' appeal and denying rehearing, and remanding for reconsideration in light of *Republic National Bank* avoids the inherent unfairness of depriving a litigant of the benefit of a new rule of law solely because his case was filed or decided after the one which this Court decided. *See e.g. United States v. Johnson*, 457 U.S. 537, 555-556 & n.16, 102 S. Ct. 2579, 73 L. Ed. 2d 202 (1982) (potential for unequal treatment is inherent in process of giving primary consideration to only one of several pending cases raising the same issue).

Indeed, this Court recently issued such summary orders in three Ninth Circuit cases where the circuit court dismissed on the same grounds involved in Petitioners' appeal. *See Stevedoring Services v. Ancora Transport*, 941 F.2d 1378 (9th Cir. 1992), *vacated and remanded*, 506 U.S. ___, 61 U.S.L.W. 3477 (Jan. 12, 1993); *Tangonan v. United States*, 506 U.S. ___, 61 U.S.L.W. 3477 (Jan. 12, 1993)

(vacating and remanding unreported Ninth Circuit decision in light of *Republic National Bank*); *Castro-Vasquez v. United States*, 506 U.S. ___, 61 U.S.L.W. 3477 (Jan. 12, 1993) (same).

In addition, on October 28, 1992, the President signed the Housing and Community Development Act of 1992, 106 Stat. ___, which amended 28 U.S.C. § 1355 expressly to insure jurisdiction in cases such as Petitioners'. *Republic National Bank*, 506 U.S. ___ at n.5. This statute applies to matters such as Petitioners', which were still pending at the time of its enactment. *See Republic National Bank*, 506 U.S. ___ at ___ (Thomas J., concurring in part and in judgment). The amendment to 28 U.S.C. § 1355 and its application to Petitioners' case provides another reason for a summary order vacating and remanding the circuit court's orders.

CONCLUSION

Because *Republic National Bank* controls the jurisdictional issue on which the Ninth Circuit's dismissal order is based, this Court should grant the petition for writ of certiorari, vacate the orders below, and remand the case to the Ninth Circuit for reconsideration in light of *Republic National Bank*. In addition, the enactment of the

Housing and Community Development Act also compels a summary order vacating and remanding to the Ninth Circuit.

Respectfully submitted,

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January 23, 1993

APPENDIX LIST

A. The order of the Court of Appeals for the Ninth Circuit in *Adaline B. Garcia and Darnell Garcia*, No. 91-561-84, issued May 8, 1992 ..... A-1

B. The order of the Court of Appeals for the Ninth Circuit denying Petitioners' Petition for Rehearing And Suggestion For Rehearing En Banc, issued October 27, 1992 ..... A-2

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. ADALINE B. GARCIA, et al., Claimants-Appellants, and REAL PROPERTY LOCATED AT 22 SANTA BARBARA DRIVE, RANCHO VERDES, CALIFORNIA, Defendant.	) No. 91-56184)) DC# CV-89-3560-R) Central California)) ORDER)) (Filed May 8, 1992)

Before: HUG, THOMPSON and FERNANDEZ, Circuit Judges

Appellee's motion to dismiss this appeal for lack of jurisdiction is granted. *See United States v. $84,740.00 U.S. Currency*, 900 F.2d 1402, 1404, (9th Cir. 1990).

Appellant's request for stay of appellate proceedings is denied as moot.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. ADALINE B. GARCIA, et al., Claimants-Appellants, and REAL PROPERTY LOCATED AT 22 SANTA BARBARA DRIVE, RANCHO VERDES, CALIFORNIA, Defendant.	No. 91-56184 DC# CV-89-3560-R Central California ORDER (Filed Oct. 27, 1992)

Before: HUG, THOMPSON and FERNANDEZ, Circuit Judges

Appellant's motion for reconsideration of this court's order dismissing the appeal is denied. The suggestion for rehearing en banc is rejected.

The Clerk is instructed to accept no further filings in this closed appeal.

APPENDIX C

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. REAL PROPERTY Located at 22 Santa Barbara Drive Rancho Palos Verdes, California, Defendant. ADALINE B. GARCIA, DARNELL GARCIA, Claimants.	NO. CV 89-3560-R SUMMARY JUDGMENT OF FORFEITURE (Filed Aug. 9, 1991)

Plaintiff United States of America commenced this judicial forfeiture action by the filing of its Complaint For Forfeiture against the defendant real property located at 22 Santa Barbara Drive in Rancho Palos Verdes, California (the "defendant property") on June 13, 1989. By way of the Complaint, the government alleged that the defendant property was subject to seizure and forfeiture to the government pursuant to the provisions of Sections 881 *et seq.* of Title 21 of the United States Code.

Claimants Darnell Garcia and Adaline B. Garcia (collectively, the "claimants") filed their Claim to the defendant property on or about June 26, 1989. By way of their claim, the claimants attested to their lawful ownership of the defendant property and consequent right to restitution of the defendant property. Claimants subsequently filed their Answer to the Complaint on or about June 29, 1991.

Lien claimant Home Savings of America filed its claim to the defendant property on or about August 14, 1989. By way of its claim, Home Savings of America attested to its lawful lien interest in the defendant property. Home Savings of America's lien interest in the defendant property was recognized by the Court.

The defendant property has been sold pursuant to the parties' Stipulation For Interlocutory Sale. Home Savings of America's lien interest in the defendant property has been satisfied from the sales proceeds. The remaining sales proceeds have been deposited with the Court as the substitute defendant *res*.

On July 1, 1991, the government filed its motion for partial summary judgment of this action (the "Motion").

After considering the papers and pleadings in this action, and after hearing oral argument on the Motion, the Court granted the Motion.

The Court has considered the matter and has been duly advised. Accordingly,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. This Court has jurisdiction over the subject matter of this action and over the defendant property and the substitute defendant *res*.

2. The Complaint states a claim for relief against the defendant property and the substitute defendant *res* under Sections 881 *et seq.* of Title 21 of the United States Code.

3. Plaintiff United States of America shall have judgment in this action as to seventy-two percent of the selling price of the defendant property, in the amount of $770,400.00. The substitute defendant *res* totals $556,493.28.

4. The United States of America shall deposit and dispose of the above amount in accordance with law.

DATED: Aug. 9, 1991

/s/ Manuel L. Real
CHIEF UNITED STATES
DISTRICT JUDGE

APPENDIX D

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ADALINE B. GARCIA and DARNELL GARCIA, Appellants, v. UNITED STATES OF AMERICA, Appellee.	No. 91-561-84 (No. CV 89-3560-R)

MOTION TO STAY PROCEEDING PENDING SUPREME COURT DECISION;

MEMORANDUM OF POINTS AND AUTHORITIES;

DECLARATION OF KATE SCHNEIDER

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Appellants Adaline B. Garcia and Darnell Garcia hereby move this Court for an order staying further appellate proceedings in *Adaline B. Garcia and Darnell Garcia v. United States*, No. 91-561-84, pending a decision by the United States Supreme Court in *United States v.*

One Single Family Residence Located at 6960 Miraflores Ave., 932 F.2d 1433 (11th Cir. 1991), *cert. granted sub. nom. Republic National Bank of Miami v. U.S.*, ___ S. Ct. ___, 1992 WL 30425, 60 U.S.L.W. 3388 (Feb. 24, 1992). The issue to be decided in that case, whether an appellate court has jurisdiction over a civil forfeiture action after removal of the *res*, in which no stay of execution was obtained, is now directly presented in this appeal.

This motion is brought pursuant to Rule 27 of the Federal Rules of Appellate Procedure and Circuit Rule 27-1 and is based upon the record in this appeal, the attached Memorandum of Points and Authorities, the Petition for *Certiorari* in *Republic National Bank*, the order granting *certiorari* in that case, and the Declaration of Kate Schneider which is attached hereto.

DATED: March 23, 1992

TUTTLE & TAYLOR,
A Law Corporation
MARK A. BORENSTEIN

/s/ Mark A. Borenstein
Mark A. Borenstein, a member of TUTTLE & TAYLOR, A Law Corporation, Attorneys for Appellants Adaline B. Garcia and Darnell Garcia

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B. In The Interests Of Fundamental Fairness and Judicial Economy, This Court Should Stay Further Proceedings On This Appeal Until The United States Supreme Court Has Resolved The Jurisdiction Issue 8

CONCLUSION 9

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

The district court granted the government's Motion For Partial Summary Judgment in this civil forfeiture action, *United States v. Real Property Located at 22 Santa Barbara Drive*, No. CV 89-3560-R and ordered the United States to recover the full amount of money retained by

the court clerk as the "substitute res" following the sale of the Garcias' home. (Appellant's Except of Record, "ER" at 179-83). Claimants Adaline and Darnell Garcia moved to stay the execution pending appeal on September 4, 1991. (Appellee's Supplemental Excerpt of Record, "SER" at 68.) However, just minutes before the hearing on the stay application, the assistant United States Attorney who prosecuted the forfeiture action announced that the government had expedited execution on the judgment after receiving notice of the Claimants' stay application and that execution was completed before the 1:30 p.m. hearing began. (SER at 4, 13.) Despite counsel's argument that the district court nevertheless retained jurisdiction to grant the stay request, the trial court denied the stay of execution application primarily on the ground that the district court lacked jurisdiction to grant the stay because the money had been transferred from the Court to the Federal Reserve Bank in Los Angeles for deposit into the Justice Department's Asset Forfeiture Account. (SER at 13, 17.)

Claimants filed their notice of appeal on September 4, 1991. (ER at 208.) (*Adaline B. Garcia and Darnell Garcia v. United States*, No. 91-561-84). After the Garcias filed their opening brief, the government challenged this Court's jurisdiction to hear this appeal based on the Ninth Circuit admiralty rule that once judgment has been executed in a civil forfeiture action, the *res* has been removed from the court's jurisdiction, and thus appellate jurisdiction ceases. *United States v. $57,480.05*, 722 F.2d 1457, 1458 (9th Cir. 1984). However, the law of six other circuits holds to the contrary; appellate jurisdiction remains despite the failure to obtain a stay. *United States v. One Lot of*

$25,721.00 in Currency, 938 F.2d 1417 (1st Cir. 1991); *United States v. Aiello*, 912 F.2d 4 (2nd Cir. 1990) *cert. denied*, ___ U.S. ___, 111 S. Ct. 757, 112 L. Ed. 2d 777 (1991); *United States v. $1,322,242.58*, 938 F.2d 433 (3rd Cir. 1991); *United States v. $95,945.18, U.S. Currency*, 913 F.2d 1106 (4th Cir. 1990); *United States v. An Art. of Drug Con. of 4,680 Pails*, 725 F.2d 976 (5th Cir. 1984); *but see United States v. $79,000 in United States Currency*, 801 F.2d 738, 739 (5th Cir. 1986); *United States v. Twelve Thousand, Three Hundred Ninety Dollars, Dorsey, Howard, ($12,390.00)*, ___ F.2d ___ 1992 WL 20720 (8th Cir. 1992).

The United States Supreme Court has granted certiorari on this precise issue of appellate *in rem* jurisdiction. *United States v. One Single Family Residence Located At 6960 Miraflores Ave.*, 932 F.2d 1433 (11th Cir. 1991), *cert. granted sub. nom. Republic National Bank of Miami v. U.S.*, ___ S. Ct. ___, 1992 WL 30425, 60 U.S.L.W. 3388 (Feb. 24, 1992). *See* Petition for Writ of *Certiorari* and Clerk's Letter Advising of Order Granting *Certiorari*, which are attached as Exhibits A and B, respectively, to the Declaration of Kate Schneider, which is attached hereto. While Appellants believe and have argued that jurisdiction over this proceeding exists based on other grounds, Appellants respectfully request this Court to stay further proceedings on their appeal, pending the United States Supreme Court decision on jurisdiction in the *Republic National Bank* case.

I. STRICT ADHERENCE TO THE EXISTING NINTH CIRCUIT RULE, SHOULD THE COURT HOLD THAT IT APPLIES TO THIS CASE, WOULD UNFAIRLY DENY THE GARCIAS THE RIGHT TO APPEAL THE GOVERNMENT'S SEIZURE OF THEIR HOME.

Civil forfeiture proceedings follow the *in rem* rules of admiralty. 21 U.S.C. § 881(b); Supplemental Rules for Certain Admiralty and Maritime Claims, Rule E. The Ninth Circuit general rule, based on admiralty law, is that execution of the judgment in a civil forfeiture proceeding usually deprives the appellate court of jurisdiction. *United States v. $57,480.05 U.S. Currency And Other Coins*, 722 F.2d 1457, 1458 (9th Cir. 1984); *United States v. $29,959.00 U.S. Currency*, 931 F.2d 549, 551 (9th Cir. 1991).

Appellants believe and have argued in their reply brief that claimants' consent to *in rem* jurisdiction supports this Court's jurisdiction. The general rule may not apply where, as here, claimants have appeared before the court and have answered the complaint. *The Willamette*, 70 F. 874, 878 (9th Cir. 1895); *Reed v. Steamship Yaka*, 307 F.2d 203, 204 (3rd Cir. 1962) *rev'd on other grounds*, 373 U.S. 410, 83 S. Ct. 1349, 10 L. Ed. 2d 448 (1963); *see also Continental Grain Co. v. Barge FBL-585*, 364 U.S. 18, 80 S. Ct. 1470, 4 L. Ed. 2d 1540 (1960); *Treasure Salvors v. Unidentified Wrecked And Abandoned Sailing Vessel*, 569 F.2d 330, 334-35 (5th Cir. 1978); 7A Moore, *Federal Practice* ¶E.05 at E203-E206 (2d ed. 1992). Moreover, Appellants argue that because of the conduct of the government and the trial court's erroneous view about its jurisdiction, the *res* was improperly removed from the district court's jurisdiction. An order staying the decision of this appeal is necessary however, since, should the Ninth Circuit

reject these arguments, Appellants would be denied an opportunity to appeal the district court's decision.

A. The Ninth Circuit Rule Is A Minority Rule.

The First, Second, Third, Fourth, Fifth and Eighth Circuits have held that the appellate court retains jurisdiction in civil forfeiture proceedings where the proceeds from the civil forfeiture have been deposited into the Justice Department's Asset Forfeiture Account, because a stay of execution was not sought or, if sought, not granted.[1] These courts have followed the lead of the late Judge Vance's dissenting opinion in *United States v. One Lear Jet Aircraft, Ser. No. 35A-280,* 836 F.2d 1571 (11th Cir. 1988) (en banc), *cert. denied,* 487 U.S. 1204, 108 S. Ct. 2844, 101 L. Ed. 2d 881 (1988), in which he criticized the rule as a "withering legal fiction in admiralty law that personified the ship," a notion which has been attacked as

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[1] *United States v. One Lot of $25,721.00 in Currency,* 938 F.2d 1417 (1st Cir. 1991); *United States v. Aiello,* 912 F.2d 4 (2nd Cir. 1990), *cert. denied,* ___ U.S. ___, 111 S. Ct. 757, 112 L. Ed. 2d 777 (1991); *United States v. $1,322,242.58,* 938 F.2d 433 (3rd Cir. 1991); *United States v. $95,945.18, U.S. Currency,* 913 F.2d 1106 (4th Cir. 1990); *United States v. An Art. of Drug Con. of 4,680 Pails,* 725 F.2d 976 (5th Cir. 1984); *but see United States v. $79,000 in United States Currency,* 801 F.2d 738, 739 (5th Cir. 1986); *United States v. Twelve Thousand, Three Hundred Ninety Dollars, Dorsey, Howard, ($12,390.00),* ___ F.2d ___ 1992 WL 20720 (8th Cir. 1992). The Seventh and Eleventh Circuits adhere to the Ninth Circuit rule. *United States v. Tit's Cocktail Lounge,* 873 F.2d 141 (7th Cir. 1989); *United States v. One Single Family Residence Located at 6960 Miraflores Ave.,* 932 F.2d 1433 (11th Cir. 1991), *cert. granted sub. nom. Republic National Bank of Miami v. U.S.,* ___ S. Ct. ___, 1992 WL 30425, 60 U.S.L.W. 3388 (Feb. 24, 1992).

"archaic, irrational, atavistic and an animistic survival from remote times." *Id.* at 1573 (citing *Continental Grain Co. v. The Barge FBL-585*, 364 U.S. 19, 23, 80 S. Ct. 1470, 1473, 4 L. Ed. 2d 1540 (1960)).

1. In Civil Forfeiture Actions Where The Judgment Has Been Executed, The Court Retains In Personam Jurisdiction Over The Government.

Other courts have held that once the government has submitted itself to the jurisdiction of the court for the purposes of civil forfeiture, it should not be allowed to escape appellate review of the judgment it has obtained. *United States v. Aiello*, 912 F.2d 4, 7 (2d Cir. 1990); *United States v. $95,945.18, U.S. Currency*, 913 F.2d 1106, 1109 (4th Cir. 1990). Courts have invoked *in personam* jurisdiction when the strict *in rem* rule, "a legal fiction which exists solely to effectuate the adjudication of disputes, is invoked for the opposite purpose" of denying jurisdiction. *United States v. An Art. of Drug Con. of 4,680 Pails*, 725 F.2d 976, 982 (5th Cir. 1984).

2. Courts Have Been Especially Hostile To The Rule Where, As Here, The Forfeiture Action Involves Cash Which Has Merely Been Transferred From One Government Account To Another.

Jurisdiction based on the location of the *res* is particularly inapposite to a forfeiture case where the "res" is money. In this case, execution of the judgment involved nothing more than the Marshal obtaining a check from

the court clerk and noting in the records that the cash would be deposited at the Los Angles Federal Reserve Bank in the Justice Department's Asset Forfeiture Account. (SER at 13.) The United States thus had possession of the money from the time the Garcias' house was sold for cash. Therefore, the execution of the judgment merely transfers the money from one government pocket to the other. "Basing jurisdiction on what pocket contains the currency is nothing more than a shell game." *United States v. One Lot Of $25,721.00 In Currency*, 938 F.2d 1417, 1421 (1st Cir. 1991); *United States v. $1,322,242.58*, 938 F.2d 433, 437-38 (3rd Cir. 1991); *United States v. $95,945.18, U.S. Currency*, 913 F.2d 1106, 1109 (4th Cir. 1990).

B. In The Interests Of Fundamental Fairness and Judicial Economy, This Court Should Stay Further Proceedings On This Appeal Until The United States Supreme Court Has Resolved The Jurisdiction Issue.

The Garcias are entitled to appeal the district court's judgment allowing the government to forfeit their home. If the Ninth Circuit rule of general *in rem* jurisdiction applies to this case, the Garcias will be denied that opportunity.

Moreover, judicial resources on this issue would be consumed unnecessarily if the Garcias' appeal proceeded while the Supreme Court considers the identical jurisdictional question which faces this Court. Even if this Court considered the jurisdictional issue and ruled against the Garcias, and even if the full Court reviewed the jurisdictional issue and denied *en banc* consideration, the Garcias

would undoubtedly seek *certiorari* on this issue. Therefore, the Garcias' case would very likely be pending when the Supreme Court decides *Republic National Bank,* and would very likely be subject to the Supreme Court's decision, irrespective of the position taken by this Court. Under these circumstances, the Court should limit the judicial resources committed to this case until the Supreme Court acts.

CONCLUSION

For all of the foregoing reasons, this Court should stay further proceedings on this appeal pending resolution of *One Single Family Residence Located at 6960 Miraflores Ave.*, 932 F. 2d 1433 (11th Cir. 1991), *cert. granted sub. nom. Republic National Bank of Miami v. United States,* ___ S. Ct. ___, 1992 WL 30425, 60 U.S.L.W. 3388 (Feb. 24, 1992) by the United States Supreme Court.

DATED: March 23, 1992

Respectfully submitted,

TUTTLE & TAYLOR,
A Law Corporation
MARK A. BORENSTEIN

/s/ Mark A. Borenstein
Mark A. Borenstein, a member of TUTTLE & TAYLOR, A Law Corporation, Attorneys for Appellants Adaline B. Garcia and Darnell Garcia

DECLARATION OF KATE SCHNEIDER

I, KATE SCHNEIDER, do hereby declare as follows:

1. I am a member of the bar of the State of California and a member of the law firm of Tuttle & Taylor. I have personal knowledge of the following facts and, if called as a witness, could and would competently testify thereto under oath.

2. On March 16, 1992, I spoke by telephone with Robert Sondak, a member of the law firm of Paul, Landy, Beiley & Harper in Miami, Florida. He told me that that firm represents the Republic National Bank of Miami in connection with the civil forfeiture litigation captioned *United States v. One Single Family Residence Located at 6960 Miraflores Ave.*, 932 F.2d 1433 (11th Cir. 1991), *cert. granted sub. nom., Republic National Bank of Miami v. United States*, ___ S. Ct. ___, 1992 WL 30425, 60 U.S.L.W. 3388 (Feb. 24, 1992).

3. I asked Mr. Sondak to send me Republic National Bank's Petition for Writ of Certiorari in the civil forfeiture action and the letter from the office of the clerk of the United States Supreme Court advising that certiorari had been granted.

4. I received from Mr. Sondak copies of both the petition for *certiorari* and the order by fax on March 16, 1992. Copies of each are attached hereto as Exhibits A and B, respectively.

Executed on March 23, 1992, in Los Angeles, California.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Kate Schneider
KATE SCHNEIDER

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff, v. REAL PROPERTY located at 22 Santa Barbara Drive, Rancho Palos Verdes, CA Defendant.	No. 91-561-84 District Court No. CV 89-3560-R
ADALINE B. GARCIA and DARNELL GARCIA, Claimants.	
ADALINE B. GARCIA AND DARNELL GARCIA, Appellants, v. UNITED STATES OF AMERICA, Appellee.	

ADALINE B. GARCIA'S AND DARNELL GARCIA'S
PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

TUTTLE & TAYLOR,
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STATEMENT OF COUNSEL

Appellants Adaline B. Garcia and Darnell Garcia petition for rehearing and also suggest rehearing en banc in this civil forfeiture case. The panel's ruling dismissing their appeal for lack of jurisdiction directly conflicts with decisions in six other courts of appeal and, as suggested by the United States Supreme Court's recent grant of *certiorari* in a case raising the identical jurisdictional question, the panel's order affects both a rule of national application where there is an overriding need for uniformity *and* involves a question of exceptional importance – a citizen's right to appeal the government's seizure of his home or other property.

The panel committed error by dismissing this appeal and abused its discretion by failing to stay proceedings until the United States Supreme Court decides *United States v. One Single Family Residence Located at 6960 Miraflores Ave.*, 932 F.2d 1433 (11th Cir. 1991), *cert. granted, sub. nom. Republic National Bank of Miami v. United States*, 112 S. Ct. 1159, 117 L.Ed.2d 406, 60 U.S.L.W. 3388 (Feb. 24, 1992). That case involves the identical question which was before the panel in this case, and which formed the basis for its dismissal of this appeal – whether the Court of Appeals retains jurisdiction over a civil forfeiture action where the substitute res has allegedly been physically removed from the geographic area of the Circuit Court before the claimant posted a bond.[1]

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[1] In this case, the facts were much more egregious than this antiseptic description suggests. Claimants were seeking permission from the district court to post a bond *at the very moment* government agents were rushing through the courthouse to

The Ninth Circuit rule on this vital question is contrary to the decisions of six circuits. Rehearing en banc is therefore warranted in this case. The lack of national uniformity on this issue creates an injustice since a claimant's right to appeal the government's seizure of his or her home depends on nothing other than the fortuity of living in a particular jurisdiction. While appellate review is an important fundamental right in all proceedings, it is especially critical in civil forfeiture actions because the government can forfeit property merely by showing probable cause that the property it seeks to forfeit was acquired in violation of a criminal statute. *See e.g., United States v. One 56-Foot Motor Yacht Named Tahuna,* 702 F.2d 1276, 1281-82 (9th Cir. 1983).

STATEMENT OF FACTS AND OPINION OF PANEL

This is an action for civil forfeiture of the Garcias' home in Rancho Palos Verdes. The Garcias purchased their home in 1987 and lived there with their son until April 1991 when, as a result of this action, their home was sold pursuant to the parties' Stipulation for Interlocutory Sale. Some of the sale proceeds was used to satisfy liens, expenses, and broker commissions. The balance was deposited with the clerk of the district court.

On August 16, 1991, the clerk entered the district court's "summary judgment of forfeiture" in this matter. (Appellants' Excerpt of Record, "ER" at 179.) The district court cursorily adopted verbatim the government's

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expedite execution on claimants' property. *See* Appellants' Supplemental Excerpt of Record ("SER") at 4.

Amended Statement of Uncontroverted Facts and Conclusions of Law, and granted summary judgment to the government even though the government had asked only for a partial summary adjudication. (ER at 27-68.) The summary judgment was received in the office of Appellants' counsel while he was away. (SER at 71.)

As soon as counsel discovered the summary judgment, and Ex Parte Application For A Stay of Execution Pending Appeal or, in the alternative, Temporary Stay Pending Hearing On Application For Stay of Execution Pending Appeal was immediately prepared and filed. The application was filed without notice, on an ex parte basis for fear that the assistant United States Attorney responsible for prosecuting the forfeiture action might speed the Marshal's execution of the forfeited funds, and while the district court was reviewing the stay application, might try to divest the appeals court of jurisdiction by relying on the Ninth Circuit rule at issue here, and executing on the judgment. Nevertheless, without granting even the requested temporary stay, the district court directed Appellants' counsel to serve the ex parte papers on the government, which was immediately done. (SER at 16-17.)

As expected, counsel for the government expedited execution when he received a copy of the Garcias' stay application at about 9:40 am on September 5. Ten minutes before the trial court convened a hearing on the stay request during that afternoon, government counsel announced that the Marshal's office had executed on the full amount of the *res*, $556,493.28, (SER at 4), by obtaining a check in this amount from the court clerk. (SER at 10.) During the entire hearing on the stay application,

however, the check remained in the possession of the clerk's office. (SER at 10.)

At the hearing, Appellants urged the district court to grant a stay in order to prevent any question about the existence of appellate jurisdiction in this case. (SER at 15.) Appellants requested that the trial court waive the requirement of the posting of a supersedeas bond since the Garcias lacked the financial means to post one, and since the money, secure in the office of the district court clerk, was not at risk of disappearing. (SER at 12, 72-79.) In the alternative, the Garcias offered to meet the bond requirement by posting one in a small amount. (SER at 74.) Instead, the district court erroneously denied the stay because it did not believe it had jurisdiction once the judgment had been executed, even though the check was still in the hands of the marshals in the district, or in transit with the clerk. (SER at 17.) In addition, the court acknowledged that the Garcias could file a supersedeas bond in the amount of the judgment and stay the execution of the judgment. (SER at 18.) However, it did not indicate why a supersedeas bond was necessary when the government's judgment was fully secured by the cash *res* in the *entire amount* of the judgment then held by the district court clerk. (*See* SER at 20.) Appellants timely filed their notice of appeal.

After Appellants filed their opening brief, and following a lengthy extension of time granted to the government to file its opposing brief, the government presented its brief on the merits and raised the jurisdictional question. Appellants replied and *thereafter,* the government moved to dismiss the appeal. Appellants opposed the motion and also moved to stay proceedings in light of the

Supreme Court's recent grant of *certiorari* in the *Republic National Bank* matter.

The Ninth Circuit panel granted the government's belated motion to dismiss. The panel also denied appellants' request for a stay of appellate proceedings pending a decision by the Supreme Court in the *Republic National Bank* as moot.

ARGUMENT

There is a recurring and irreconcilable conflict among nine circuits on the jurisdictional issue presented to the Court. The United States Supreme Court has granted *certiorari* to resolve the conflict. Where what is at stake is the basic right to appeal a judgment allowing the government to seize one's home, the panel in this case should not have dismissed this appeal prematurely while the precise issue with which it was confronted is pending before the United States Supreme Court. Instead, the panel should have followed the rule in the majority of circuits or, at the very least, granted a stay of the proceedings in this case until the Supreme Court rules on the jurisdiction issue.

By statute and court rule, civil forfeiture proceedings follow the *in rem* rules of admiralty. 21 U.S.C. § 881(b); Supplemental Rules for Certain Admiralty and Maritime Claims, Rule E. Admiralty jurisdiction is based on the "long-standing admiralty fiction that a vessel may be assumed to be a person for the purpose of filing a lawsuit and enforcing a judgment." *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19, 22-23, 80 S. Ct. 1470, 4 L. Ed. 2d 1540 (1960). The consequence of this legal fiction is that in

admiralty cases, the presence of the *res* within a Court's territorial jurisdiction is usually necessary before the court may adjudicate the claim.

The Ninth Circuit rule, based on admiralty law, that in most cases, removal of the *res* (here, the money) from the geographical jurisdiction of the district court and the Ninth Circuit deprives both courts of subject matter jurisdiction, *United States v. $57,480.05 U.S. Currency And Other Coins*, 722 F.2d 1457, 1458 (9th Cir. 1984); *United States v. $29,959.00 U.S. Currency*, 931 F.2d 549, 551 (9th Cir. 1991), is contrary to the law of six circuits.[2]

I. THE PANEL SHOULD HAVE CONSIDERED AND FOLLOWED THE WELL REASONED AUTHORITY OF SIX OTHER CIRCUITS WHICH HOLDS THAT REMOVAL OF THE RES AND FAILURE TO POST A BOND DO NOT DEPRIVE AN APPELLATE COURT OF JURISDICTION OVER THE FORFEITURE ACTION.

The Ninth Circuit has held that in the context of a civil forfeiture action, the removal of the *res* usually ends

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[2] *United States v. One Lot of $25,721.00 in Currency*, 938 F.2d 1417 (1st Cir. 1991); *United States v. Aiello*, 912 F.2d 4 (2nd Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 757, 112 L. Ed. 2d 777 (1991); *United States v. $1,322,242.58*, 938 F.2d 433 (3rd Cir. 1991); *United States v. $95,945.18, U.S. Currency*, 913 F.2d 1106 (4th Cir. 1990); *United States v. An Article of Drug Consisting of 4,680 Pails*, 725 F.2d 976 (5th Cir. 1984); *but see United States v. $79,000 in United States Currency*, 801 F.2d 738, 739 (5th Cir. 1986); *United States v. Twelve Thousand, Three Hundred Ninety Dollars ($12,390.00)*, 956 F.2d 801 (8th Cir. 1992).

the court's jurisdiction. *United States v. $10,000 U.S. Currency,* 860 F.2d 1511, 1513 (9th Cir. 1988).[3] The First, Second, Third, Fourth, Fifth and Eighth Circuits[4] have, however, rejected this rule as a "defective legal fiction" which unfairly denies claimants any right of appeal. The panel should have considered the weight of authority against the Ninth Circuit rule and should either have followed it, or at least granted a stay of the appellate proceedings while the Supreme Court considers the issue.

A. In Civil Forfeiture Actions, Even Where the Judgment Has Been Executed And The Res Is Outside The Court's Jurisdiction, The Court Retains In Personam Jurisdiction Over the Government.

In *United States v. One Lear Jet Aircraft, Ser. No. 35A-280,* 836 F.2d 1571 (11th Cir. 1988) (en banc) *cert. denied,* 487 U.S. 1204, 108 S. Ct. 2844, 101 L. Ed. 2d 881 (1988), the late Judge Vance, in his dissenting opinion, articulated the rationale for departure from this archaic admiralty rule. This rationale has provided the basis upon which six circuits have rejected the admiralty rule as applied to civil forfeiture actions. *One Lear Jet* involved the forfeiture of an aircraft which the government had removed to a warehouse out of state. The majority held

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[3] The Seventh and Eleventh Circuits have held similarly. *United States v. Tit's Cocktail Lounge,* 873 F.2d 141 (7th Cir. 1989); *United States v. One Single Family Residence Located at 6960 Miraflores Ave.,* 932 F.2d 1433 (11th Cir. 1991), *cert. granted, sub. nom. Republic National Bank of Miami v. U.S.,* 111 S. Ct. 1159, 117 L.Ed.2d 406, 60 U.S.L.W. 3388 (Feb. 24, 1992).

[4] *See* Note 2, *supra.*

that the removal of the *res* from the court's territorial jurisdiction destroyed its *in rem* jurisdiction, and hence its authority to hear the appeal. *Id.* at 1573.

Judge Vance, however, demonstrated that the appeals court had *in personam* jurisdiction over the United States from the moment the government invoked the jurisdiction of the federal courts to initiate the forfeiture proceedings. *Id.* at 1578. Judge Vance also criticized the *in rem* rule as "a withering legal fiction in admiralty law that personified the ship," a notion which has been attacked as "archaic, irrational, atavistic and an animistic survival from remote times." *Id.* (citing *Continental Grain Co. v. The Barge FBL-585*, 364 U.S. 19, 23, 80 S. Ct. 1470, 1473, 4 L. Ed. 2d 1540 (1960)). An already shaky admiralty rule has no relevance in the context of a civil forfeiture action:

> The jurisdictional issue in this case involves the United States, not the claimant [. . .]. The plaintiff United States, after initially invoking the jurisdiction of the federal courts and then removing the *res* from the district, now claims lack of subject matter jurisdiction in order to defeat claimant's attempt to appeal to this court. This is the exact opposite of what usually occurs in *in rem* cases, where the defendant ship stealthily absconds from port and leaves the plaintiff with no *res* from which to collect. In the usual *in rem* case the issue then becomes whether the plaintiff may establish *in personam* jurisdiction of the owner of the *res* once the *res* has been removed from the district. (citations omitted). In this case the issue is whether the defendant may establish *in personam* jurisdiction

> over the instigator of the *in rem* action, the plaintiff.

Id. at 1579.

The Second Circuit, in *United States v. Aiello*, 912 F.2d 4 (2d Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 757, 112 L. Ed. 2d 777 (1991), followed the dissenting opinion in *One Lear Jet*. That court rejected the government's contention that appellate jurisdiction was extinguished once control of the forfeited properties passed from the district court to the United States Treasury:

> [T]he concepts of continuing territorial presence and control in forfeiture actions derive from the admiralty fiction of a ship's personality, a legal construct of dubious validity. (citations omitted). With the force of those concepts diminishing in admiralty, (citations omitted), they surely ought not to be routinely invoked to deny citizens an opportunity for appellate review of judgments forfeiting their property to the Government . . . [T]he United States, 'having submitted itself to the jurisdiction of the court, . . . should not be allowed to escape' appellate review of the judgment it has obtained.

Id. at 6-7. *See also United States v. An Article of Drug Consisting of 4,680 Pails*, 725 F.2d 976 (5th Cir. 1984) ("[W]e have dispensed with strict application of this *in rem* rule when a legal fiction which exists solely to effectuate the adjudication of disputes is invoked for the opposite purpose, and we have found a substitute basis of in personam jurisdiction").

B. Where, As Here, The Forfeiture Action Involves Cash Which Merely Has Been Transferred From One Government Fund To The Other, The Admiralty Rule Is Particularly Inapposite.

Where the forfeiture action has involved cash and the "removal" of the *res* has consisted of simply transferring the money from one government bank account to another, as is the case here, courts have been particularly adverse to the application of the "no res, no jurisdiction" rule. In *United States v. $1,322,242.58*, 938 F.2d 433 (3rd Cir. 1991), the circuit court rejected the government's argument that the removal of the forfeited funds from one Justice Department account and the deposit of the funds into another such account deprived the court of jurisdiction.

> [T]he government has not explained why the federal courts lost control of the *res* at issue here when, after forfeiture, this sum was transferred from the Justice Department's Seized Asset Deposit Fund to the Justice Department's Asset Forfeiture Fund. Both funds hold Justice Department monies. Both funds are accounts with the United States Treasury. The government has informed us that the Seized Asset Deposit Fund was created administratively pursuant to 28 U.S.C. § 524(c)(1) to hold seized cash pending forfeiture and the Asset Forfeiture Fund was created by 28 U.S.C. § 524(c)(1) to hold the proceeds of forfeited property, but the government has not explained why the federal courts have greater legal authority with respect to the former fund than with respect to the latter. In the absence of any such explanation, we have no grounds for holding that transfer of the *res* from

> one fund to the other deprived the federal courts of jurisdiction.

Id. at 438-39.

Similarly, in *United States v. $95,945.18, U.S. Currency*, 913 F.2d 1106, 1109 (4th Cir. 1990), the fourth circuit rejected the government's attempt to deprive the court of jurisdiction where the government had seized cash, had prevailed in forfeiture proceedings, and had subsequently transferred the money to the Asset Forfeiture Fund. *Id.* at 1107. *See also United States v. Twelve Thousand, Three Hundred Ninety Dollars ($12,390.00)*, 956 F.2d 801 (8th Cir. 1992) (theories that government had subjected itself to *in personam* jurisdiction and possession of *res* by the government especially persuasive where the *res* is cash, which unlike ships, is fungible); *United States v. One Lot Of $25, 721.00 In Currency*, 938 F.2d 1417 (1st Cir. 1991) ("Jurisdiction based on the location of the *res* is particularly inapposite to a currency forfeiture case. The government has possession and control of the currency from the time it seized it. The execution of the judgment merely transfers it from one government pocket to the other. Basing jurisdiction on what pocket contains the currency is nothing more than a shell game").

Just this sort of transfer, "from one government pocket to another," occurred in this case. Denial of jurisdiction on this basis defies logic and common sense and unfairly denied the Garcias their right to appeal.

C. The Panel's Dismissal Of This Appeal Is Particularly Unfair Since The Garcias Tried To Obtain A Stay Of Execution.

The Garcias requested a stay and offered to post a bond on September 4, 1991. (SER at 5.) Approximately twenty-four hours later, and within minutes of the hearing on the Garcias' stay application, the judgment was allegedly executed by the Marshal on an expedited basis at the prosecutor's direction. (SER at 5.) The vast majority of cases in which appellate jurisdiction has been denied are instances in which the claimant has made *no attempt* to seek a stay.[5] The Garcias were guilty of no such failure. The panel's dismissal of their appeal because their attempt to obtain a stay came minutes after the government's expedited procedures were completed violates basic concepts of fundamental fairness.

II. THIS MATTER WARRANTS CONSIDERATION BY AN EN BANC PANEL.

The panel's dismissal of the Garcias' appeal resulted only from the government's calculated effect to divest this court of jurisdiction while the Garcias' were

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[5] *See e.g. United States v. 66 Pieces of Jade*, 760 F.2d 970, 973 (9th Cir. 1985); *United States v. $57,480.05 U.S. Currency And Other Coins*, 722 F.2d 1457, 1458 (9th Cir. 1984); *U.S. v. One Lear Jet Aircraft, Ser. No. 35A-280*, 836 F.2d 1571, 1574 (11th Cir. 1988); *United States v. One Single Family Residence*, 932 F.2d 1433, 1434 (11th Cir. 1991); *United States v. Certain Real and Personal Property Belonging To Hayes*, 943 F.2d 1292-1294, (11th Cir. 1991); *United States v. Tit's Cocktail Lounge*, 873 F.2d 141, 144 (7th Cir. 1989).

attempting to satisfy the rules concerning a stay of execution.

The Ninth Circuit's continued enforcement of an archaic rule of admiralty which (1) lacks any rationale relevant to the civil forfeiture context, and (2) may soon be annihilated by the Supreme Court, warrants review by an *en banc* panel. Ninth Circuit appellants should not be penalized by enforcement of a rule which does not apply to appellants who live elsewhere and which may not even apply in the Ninth Circuit in a matter of months.

Appellants have argued on appeal that other bases for jurisdiction exist, *see* Appellants' Reply Brief at 10-13, and that the government did not prove its case and unfairly deprived appellants of the sale proceeds of their home. Appellants' Opening Brief at 9-10; Appellants' Reply Brief at 14-24. They do not repeat those arguments here. Appellants do argue, however, that the dismissal of their appeal and the denial of their motion to stay the proceedings pending a decision in *United States v. One Single Family Residence Located at 6960 Miraflores Ave.*, 932 F.2d 1433 (11th Cir. 1991), *cert. granted, sub. nom. Republic National Bank of Miami v. United States*, 112 S. Ct. 1159, 117 L.ed.2d 406, 60 U.S.L.W. 3388 (Feb. 24, 1992), was unwarranted, premature, and merits consideration of an *en banc* panel of this Court.

CONCLUSION

The Court should grant rehearing, or in the alternative, grant Claimants' Motion to Stay. In the event rehearing is rejected, the entire Court should rehear the appeal *en banc*. The Garcias may not be particularly sympathetic

claimants in light of Mr. Garcia's criminal connection; nevertheless, their right to seek appellate review should not depend on the U.S. Attorney's ability to command the marshal to expedite execution, or on whether the decision was rendered in Los Angeles as opposed to New York or Baltimore. Individuals with their convictions on appeal are entitled to maintain a civil appeal regarding their property.

DATED: May 21, 1992

Respectfully submitted,

TUTTLE & TAYLOR, A Law Corporation
MARK A. BORENSTEIN

/s/ Mark A. Borenstein
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Supreme Court, U.S.
FILED
APR 30 1993
OFFICE OF THE CLERK

No. 92-1442

In the Supreme Court of the United States

OCTOBER TERM, 1992

ADALINE B. GARCIA AND DARNELL GARCIA,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

WILLIAM C. BRYSON
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JOHN C. KEENEY
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QUESTION PRESENTED

Whether the court of appeals lacked jurisdiction over an appeal from an *in rem* forfeiture proceeding after the *res* was released from the district court's control and deposited in the United States Treasury.

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1442

ADALINE B. GARCIA AND DARNELL GARCIA,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The order of the court of appeals (Pet. App. A1) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1992. A petition for rehearing was denied on October 27, 1992. Pet. App. A2. The petition for a writ of certiorari was filed on January 25, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On June 13, 1989, the United States filed an *in rem* action in the United States District Court for the Central District of California seeking forfeiture under 21 U.S.C. 881 of real property located at 22 Santa Barbara Drive, Rancho Palos Verdes, California. On June 26, 1989, petitioners filed a claim to the property. Home Savings of America also filed a claim asserting that it had a lien on the property. While the forfeiture action was pending, the parties agreed to an interlocutory sale of the property. After payment of the lien held by Home Savings, the remaining proceeds from the sale, $556,493.28, were deposited with the court as a substitute *res*. Pet. App. A4-A5.

On July 1, 1991, the United States moved for partial summary judgment. On August 9, 1991, the district court granted the government's motion, holding that the government was entitled to recover 72 percent of the selling price of the property or $770,400. Pet. App. A5.

2. Petitioners filed a notice of appeal and sought a stay in the district court of the order granting summary judgment, but they did not post a supersedeas bond. Before the district court acted on the request for a stay, the government transferred the *res* to the United States Treasury. The district court denied the motion for a stay.

The government then moved to dismiss petitioners' appeal of the district court's order granting summary judgment. The court of appeals granted the motion. It relied on its decision in *United States* v. *$84,740.00, U.S. Currency*, 900 F.2d 1402, 1404 (9th Cir. 1990), which held that removal of the *res* from the district where the forfeiture action was brought following entry of a valid decree of forfeiture terminates the court's control over

the property and deprives the court of appeals of jurisdiction. Pet. App. A1.

ARGUMENT

Petitioners ask (Pet. 6-9) the Court to grant the petition for a writ of certiorari, vacate the decision of the court of appeals, and remand for further consideration in light of *Republic National Bank* v. *United States*, 113 S. Ct. 554 (1992). Because the decision in *Republic National Bank* rejected the reasoning on which the court of appeals relied in dismissing petitioners' appeal, we agree with petitioners that the court of appeals' judgment should be vacated and the case remanded to the court of appeals.

In *Republic National Bank*, as in this case, the district court granted judgment for the government on a complaint seeking *in rem* forfeiture of property in which the petitioner claimed an interest. The claimant filed a timely notice of appeal, but failed to file a supersedeas bond or obtain a stay of the district court's judgment. The government transferred the *res* from Florida to the United States Treasury, and then moved to dismiss the appeal on the ground that the removal of the *res* from the judicial district deprived the court of appeals of jurisdiction. The court of appeals granted the motion and dismissed the appeal. This Court reversed and remanded. The Court held that "in an *in rem* forfeiture action, the Court of Appeals is not divested of jurisdiction by the prevailing party's transfer of the res from the District." 113 S. Ct. at 559-560.

The reasoning of *Republic National Bank* is applicable in this case. Here, as in *Republic National Bank*, the court of appeals relied on the removal of the *res* from the control of the district court as a ground for dismissing the claimant's appeal. That reasoning in no longer valid in light of the Court's decision in *Republic*

National Bank. Accordingly, the Court should vacate the court of appeals' decision and remand for further proceedings consistent with *Republic National Bank*.

CONCLUSION

The petition for certiorari should be granted, the decision of the court of appeals should be vacated, and the case should be remanded for further consideration in light of *Republic National Bank* v. *United States*, 113 S. Ct. 554 (1992).

Respectfully submitted.

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